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Supreme Court of the United States.

OCTOBER TERM, 1972.

No.

EDWARD GEORGE BOOZ,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Edward George Booz petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

Opinion Below.

The judgment and order of the Court of Appeals is not reported (App. A, *infra*, p. 16).

Jurisdiction.

The judgment of the Court of Appeals was entered on February 15, 1973. On March 21, 1973, the Court of Appeals denied a petition for rehearing with suggestion for rehearing en banc (App. B, *infra*, p. 17). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

I. Where a defendant asserts judicial misconduct by virtue of prejudicial remarks, and the government concedes that the remarks were derogatory, and the appellate court acknowledged the undesirability of the trial judge's conduct, does due process require a new trial because of the impossibility of calculating the effect of the misconduct on the jury's verdict?

II. Where a judgment of conviction is reversed, do Due Process and Title 28 U.S.C. § 144, require a retrial before a trial judge other than the one who presided at the first trial; especially where the trial judge articulated his disbelief of the defendant's testimony before the commencement of the second trial?

III. In evaluating the sufficiency of the government's evidence in a light most favorable to it, does the court have the duty to direct an acquittal where circumstantial evidence is equally consistent with innocence as with guilt and there is no other evidence?

Statement of the Case.

The petitioner was charged with bank robbery in violation of Title 18 U.S.C. § 2113 (a) (b) (d). The petitioner was found guilty after trial held before District Court Judge Harold K. Wood. On appeal to the Court of Appeals for the Third Circuit the judgment of conviction was reversed and the case remanded to Judge Wood for a new trial. *United States* v. *Booz*, 451 F. 2d 719. On remand, the petitioner filed a motion to disqualify Judge Wood and, after hearing, the motion was denied by Judge Wood (App. C, *infra*, pp. 19-21).

On retrial the petitioner was again found guilty and appealed to the Court of Appeals for the Third Circuit. The

judgment of conviction was affirmed and a petition for rehearing was denied.

The indictment stemmed from a robbery of the Bucks County Bank and Trust Company, Dublin Branch, Dublin, Pennsylvania, on April 18, 1967 The government's case was based entirely upon circumstantial evidence. The petitioner was a carnival operator who, due to the nature of the business, customarily handled large amounts of cash. For two or three years prior to the robbery the defendant had been a regular customer of the bank, and was on a first-name basis with all the employees. The government attempted to establish that the petitioner usually patronized the bank about once a month, but about one month prior to the robbery the frequency of his visits increased. On one occasion the petitioner had the opportunity to observe an employee opening the safe as he was waiting outside for the bank to open for business (*United States* v. *Booz*, 451 F. 2d 719). The government contended that the petitioner was at the bank early in order to determine the daily bank procedures (App. F, *infra*, pp. 30-31); however, the evidence demonstrated that it was not uncommon for customers to be at the bank before it opened (App. F, *infra*, p. 31).

The bank employees could not identify either of the two robbers as they were effectively masked (*United States* v. *Booz, supra*). Two of the employees were permitted to testify, over objections, that the robbers' voices were disguised (App. F, *infra*, pp. 31-32). The government argued to the jury that only a person known to the employees would have disguised his voice (App. F, *infra*, pp. 31-32). Cross-examination revealed that one witness who said the voice was "disguised" never heard the robber speak before the day of the robbery and that the robber spoke only four or five words (App. F, *infra*, p. 32).

One bank employee testified that one of the robbers wore a felt hat which he described as an "old" hat (App. F, *infra*, p. 32). The government showed the hat to another bank witness who could not identify it as the hat worn by a robber; he could only say it was similar (App. F, *infra*, p. 33). This hat was crucial to the government's case. It was found by FBI Agent Noah Bass, two or three miles from the bank (App. F, *infra*, p. 33). He stated that when he found the hat it was new and bore a price tag (App. F, *infra*, p. 33).

Three days after the hat was found a farmer observed a white pickup truck, having a registration number that was "something like" S0633 (App. F, *infra*, pp. 33-34). The petitioner owned a white pickup truck bearing registration number S6003R. The government argued that because of the alleged similarity of the defendant's truck and registration with that observed by the farmer, the petitioner must have been in that area to retrieve his hat lost on the day of the robbery (App. F, *infra*, p. 34). It must be noted that the farmer, at the earlier trial, could not remember the registration number he had observed. *United States* v. *Booz*, 451 F. 2d 719. The evidence also showed that another person owned a pickup truck (color unknown), bearing registration number S0336R and that this other person lived in the same general area (App. F, *infra*, p. 34). Additional evidence tending to demonstrate other similar registration numbers on pickup trucks was refused (Tr. vol. 5, pp. 130-145, Covington cross-examination).

The strongest evidence in the case, from the government's point of view, was that 63 days after the robbery the defendant made a bank deposit in which were found 17 of 25 "bait bills" taken in the course of the robbery (*United States* v. *Booz, supra*).

Throughout the course of the trial the judge, in his comments to defense counsel and in his characterization of evi-

dence, manifested harsh asperity and discourtesy. The most blatant of these will be cited in the argument in support of question one.

Reasons for Granting the Writ.

Question One.

The petitioner submits that the appellate court's judgment and order is a far departure from the decisions of this Court and that it sanctioned a departure from the usual course of judicial proceedings by the lower court.

During the course of the trial, the judge continually made remarks derogatory of defense counsel and the merits of the defense. Among the most serious, and made in the presence of the jury, were: a concurrence with the government's accusation that counsel was acting in bad faith (App. F, *infra,* pp. 35-36); continual implications and innuendoes that counsel was attempting to keep facts from the jury (App. F, *infra,* pp. 36-37); and, when defense counsel was rebutting crucial government evidence,[1] the court called defense counsel's evidence "ridiculous," and "so irrelevant it's unbelievable" (App. F, *infra,* p. 37). These occasions are not a complete list but merely illustrative.

The petitioner submits that such comments were totally improper and constitutionally impermissible. *Billeci* v. *United States,* 184 F. 2d 394 (D.C. Cir. 1950). *United States* v. *Andolschek,* 142 F. 2d 503 (2d Cir. 1944). The Court of Appeals in its judgment and order felt "constrained" to comment that the judge's "expressions of impatience . . . fell short of desirable judicial fastidiousness"

---

[1] In the first appeal, the Third Circuit labeled the evidence as "critical to the prosecution's case." *Booz, supra,* 451 F. 2d, at 724.

(App. A, *infra*, p. 16).[2] The government, in its brief presented to that court, recognized the "critical" quality of the remarks.

The petitioner seeks review because the judgment and order overlooks the principles expounded in *Jackson* v. *Denno*, 378 U.S. 368, and *Bruton* v. *United States*, 391 U.S. 123. Once it is conceded that judicial remarks and expressions were critical and short of the mark as to judicial desirability, it is impossible to gauge or to calculate their effect upon the jury. The inability to dissect a jury verdict was discussed at length in *Jackson, supra*. In *Bruton, supra*, at 135, it was held that this inability could not be overlooked.

> "[A]s was recognized in *Jackson* v. *Denno, supra*, there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."

This becomes all the more vital when one applies it against the evidence presented to the jury, to wit, circumstantial evidence. As noted in *Jackson, supra*, and repeated in *Bruton, supra*, at 129, the government is not entitled to this windfall to bolster its case.

In conclusion, the petitioner submits that once it is admitted and recognized that judicial conduct was less than desirable, it becomes clear that his trial was not fair because it is impossible to know to what degree the verdict was founded upon the prejudicial remarks.

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[2] The court also attributed these "expressions" to defense counsel's "repetitious" cross-examination (App. A, *infra*, p. 16).

QUESTION TWO.

At the hearing on disposition after the first trial, District Court Judge Wood noted that the petitioner's attitude had "been anything but favorable to him" in that he threatened the probation department with noncooperation if probation was imposed upon him (App. F, *infra*, p. 29). The petitioner stated the allegation was untrue. Judge Wood then remarked:

> "Well you say it isn't. I believe them. I don't believe you. I didn't believe you at the trial, and I don't believe you now." (App. F, *infra*, p. 29).

After appeal, reversal, and remand to Judge Wood for retrial, the petitioner filed a motion to disqualify. The motion was denied.

A. *The Appearance of Fairness and Impartiality Requires a Per Se Rule of Retrial before a Different Judge, at Least in Multi-Judge Districts.*

In the District of Massachusetts, Local Rule 8i requires a retrial before a different judge. In the Southern District of New York the Court of Appeals for the Second Circuit mandates a retrial before a different judge. The rationale and rule for both circuits is best stated in *United States* v. *Bryan*, 393 F. 2d 90, 91 (C.A. 2, 1968):

> "We believe that at least in a multi-judge district such as the Southern District of New York where the necessity of retrial before the same judge is not present, the practice of retrial before a different judge is salutary and in the public interest, especially as it minimizes even a suspicion of partiality. Because we believe that this outweighs any considerations of judi-

> cial economy and convenience, we hold that it is the wiser practice, wherever possible, that a lengthy criminal case be retried before a different judge unless all parties request that the same judge retry the case."

A per se rule, as noted above, eliminates a suspicion of partiality. Further, it is not a burden on anyone and would probably be overwhelmingly welcomed by the members of the federal judiciary. The Court of Appeals for the Third Circuit, below, rejected this argument. Accordingly, there is a conflict between the Second and Third Circuits.

B. *Due Process and Title 28 U.S.C. § 144 Require Retrial before a Different Judge where the Original Judge has Formed an Unfavorable Opinion of the Defendant or has Prejudged the Merits.*

Impartial justice is a legal necessity and a lack of requisite impartiality violates due process of law. In *Knapp* v. *Kinsey,* 232 F. 2d 458, 465 (C.A. 6, 1956) the court stated:

> "One of the fundamental rights of a litigant under our judicial system is that he is entitled to a fair trial in a fair tribunal, and that fairness requires an absence of actual bias or prejudice in the trial of the case. In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942; Talbert v. Muskegon Construction Co., 305 Mich. 345, 348 N.W. 2d 572. If this basic principle is violated, the judgment must be reversed. In re Murchison, supra; Berger v. United States, 255 U.S. 22, 41 S. Ct. 230, 65 L. Ed. 481; Moskun v. United States, 6 Cir., 143 F. 2d 129, 130; N.L.R.B. v. Phelps, 5 Cir., 136 F. 2d 562." See also *Sheppard* v. *Maxwell,* 384 U.S. 333, 357 (1966).

Title 28 U.S.C. § 144 provides in full:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

On its face the statute appears to give an automatic right to disqualification upon the filing of an affidavit. However, it is generally accepted that the facts alleged in the affidavit must give "fair support" to the assertions of bias or prejudice. *Berger* v. *United States,* 255 U.S. 22, 23 (1920). What constitutes "personal bias or prejudice" within the meaning of § 144 has been discussed at length by many courts.

> "[I]ts solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them *but shall give assurance* that they are impartial, free . . . from any 'bias or prejudice' that might disturb the normal course of impartial judgment." (*Berger* v. *United States,* 255 U.S. 22, 35-36.) (Emphasis supplied.)

In *Whitaker* v. *McLean*, 118 F. 2d 596 (D.C. Cir. 1941), the plaintiff alleged that prejudicial remarks, in the absence of the jury, evidenced bias and prejudice. In reversing the defendant's directed verdict, the court held:

> "The judge may, as indeed he insisted, have felt no hostility, to the plaintiff, and in that way he was subjectively free from bias. But bias must be considered objectively. . . . The policy underlying . . . [Section 144] is that the courts of the United States shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial; *i.e.*, shall appear to be impartial."

Thus the standard embraced by the statute and *Berger* is objective rather than subjective. See also Note, "Disqualification of Judges for Bias in the Federal Courts," 79 Harv. L. Rev. 1435, 1446 (1966). Some courts have concluded that bias or prejudice is insufficient unless it is "a personal bias of an extra-judicial origin." *Craven* v. *United States*, 22 F. 2d 605 (C.A. 1, 1927). *United States* v. *Hanrahan*, 248 F. Supp. 471 (D.C. D.C. 1965). See contra, *Wolfson* v. *Palmiere*, 396 F. 2d 121, 124 (C.A. 2, 1968).

The court below, in refusing to disqualify, relied on *Hanrahan, supra*, where the court said:

> "The distinction to be drawn is 'between a judicial determination derived from evidence and lengthy proceedings had before the court, and a determination not so founded upon facts brought forth in court, but based on attitudes and conceptions that have their origins in sources beyond the four corners of the courtroom.' In re Federal Facilities Realty Trust Co., supra, 140 F. Supp. at 526. A bias or prejudice, if it may be called

that, consisting merely in a state of mind based on the evidence adduced in open court is not the personal bias proscribed by the statute. See United States v. Gilbert, 29 F. Supp. 507, 508-509 (S.D. Ohio 1939)." (248 F. Supp. at 476.)

The emphasis on the words "personal" or "extra judicial" to the exclusion of all other reasonable factual showings is absurd and deprives *Berger* and § 144 of their intent to assure a fair tribunal where there is a showing of fair support to an allegation of bias despite its origin. Reliance on *Hanrahan* is continued and artificial. Judge Wood's remarks made months before the commencement of the second trial conclusively demonstrated that the judge had prejudged the merits.

The petitioner submits that the decisions below are in such conflict with the principles embraced in *Berger* v. *United States,* 255 U.S. 22 (1920), and Title 28, § 144 that the writ should be granted.

Question Three.

In not reversing the lower court's denial of the petitioner's motion for a directed verdict and motion for judgment of acquittal, the Third Circuit effectively came into conflict with the holding of the Eighth Circuit in *United States* v. *Jones,* 418 F. 2d 818 (8th Cir. 1969). This conflict also presents an issue as to which circuit properly follows this Court's holding in *Holland* v. *United States,* 348 U.S. 121.

The petitioner's above-mentioned motions were predicated upon the grounds, among others, that the verdict was contrary to the weight of the evidence, and the verdict was not supported by substantial legal evidence (Apps. D, E, *infra,* pp. 23-25, 27).

In *Holland, supra,* at 139-140, this Court recognized that some circuits instruct the jury that circumstantial evidence must be of such a nature as to exclude every reasonable hypothesis other than guilt. It was further stated:

> "[B]ut the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect. [Citations omitted.]"

The Eighth Circuit, in *Jones, supra,* at 826, has interpreted *Holland* to mean that where evidence does not exclude every reasonable hypothesis other than guilt, even while viewing it in a light most favorable to the government, the *Holland* issue of which jury instruction is proper is of no import in that the matter should not go to the jury at all.

> "Notwithstanding the *Holland* rule, the principles relied on here are certainly still applicable to criminal cases. Where the government's evidence is equally as strong to infer innocence of the crime charged, as it is to infer guilt, we are not dealing in the realm of credibility, but legal sufficiency and a court has the duty to direct an acquittal."

The petitioner has synopsized the government's evidence in the statement of the case above. It is submitted that had the *Jones* interpretation of *Holland* been followed, the matter would not have gone to the jury with reasonable doubt instructions; rather, the petitioner's motion for judgment of acquittal would have been granted. It is submitted that this conflict between the Eighth and Third Circuits should be resolved.

Conclusion.

For the above-discussed reasons, the petitioner respectfully requests that this petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

MONROE L. INKER,

KEVIN M. KEATING,

CHARLOTTE ANNE PERRETTA.

Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 72-1413.

UNITED STATES OF AMERICA
v.
EDWARD GEORGE BOOZ,
Appellant.

(D. C. Criminal No. 23398)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)
October 31, 1972

Before Kalodner, Adams and Rosenn, *Circuit Judges.*

Monroe L. Inker, Esquire
Kevin M. Keating, Esquire
Charlotte Anne Perretta, Esquire
Crane, Inker & Oteri
Boston, Massachusetts
Attorneys for Appellant

Robert E. J. Curran, Esquire
John F. Penrose, Esquire
Philadelphia, Pennsylvania
Attorneys for Appellee

Judgment Order.

After considering the appellant's contentions that the trial judge erred in denying appellant's "Motion to Disqualify," and in depriving the appellant of a fair trial by reason of "remarks and visible impatience" directed at defense counsel, and further prejudicially erred in several evidentiary rulings and in denying appellant his request for a "short continuance" to permit service of a bench warrant on a defense witness; and, having reached the conclusion that in light of the record we cannot say that the trial judge committed prejudicial error although we are constrained to say that his expressions of impatience with defense counsel, occasioned by the latter's repetitious cross-examination, fell short of desirable judicial fastidiousness;

It is ORDERED AND ADJUDGED that the judgment of sentence of the District Court be and is hereby affirmed.

By the Court:
KALODNER

Dated: February 15, 1973

Attest:
Thomas F. Quinn, Clerk

Appendix B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 72-1413.

UNITED STATES OF AMERICA
v.
EDWARD GEORGE BOOZ,
Appellant.

SUR PETITION FOR REHEARING

Present: Seitz, *Chief Judge;* and Kalodner, Van Dusen, Aldisert, Adams, Gibbons, Rosenn, and Hunter, *Circuit Judges.*

The petition for rehearing filed by Edward George Booz, Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

[Illegible],
Circuit Judge

Dated: March 21, 1973

Appendix C.

Defendant's Motion for Disqualification.

[Filed December 30, 1971.]

Now comes the defendant in the above-captioned matter and respectfully requests that his pre-trial hearing on the question of a denial of a speedy trial be reassigned to a judge other than the judge before whom the first such hearing was held.

And as grounds therefor, the defendant states:

1. That on August 27, 1968 the defendant was indicted for certain crimes committed on April 18, 1967; that his trial commenced on January 27, 1971. A Motion to Dismiss for Lack of a Speedy Trial was duly filed but denied by the Honorable Harold K. Wood.

2. That the trial was held before the Honorable Harold K. Wood, and upon the return of a verdict of guilty, the defendant was sentenced by the Honorable Harold K. Wood.

3. That on April 1, 1971, the defendant filed a Claim of Appeal which came to be heard by the United States Court of Appeals for the Third Circuit, said Court filing on November 17, 1971, an order and adjudication stating in part:

> "... [I]t is now here ordered and adjudged by this Court that the judgment of the said District Court ... be, and the same is hereby reversed, and the cause remanded for a new trial, unless the said District Court is in a position to decide prior to trial that appellant was denied a speedy trial, in accordance with the opinion of this Court."

Defendant respectfully states that there is no compelling reason why his case, upon remand, should come to be heard by the Honorable Judge before whom the first trial was held and therefore respectfully requests that his cause be reassigned to another Honorable Judge of this Court.

Respectfully submitted,
By his attorney,
CHARLOTTE ANNE PERRETTA.

Certificate of Good Faith in Support of Defendant's Affidavit on Motion to Disqualify.

[Filed February 4, 1972.]

I, Charlotte Anne Perretta, counsel of record for Edward G. Booz, certify in accordance with 28 U.S.C. § 144 that Defendant's Affidavit setting forth facts and reasons for the belief that bias or prejudice exists is made in good faith.

CHARLOTTE ANNE PERRETTA.

Dated this 6th day of January, 1972, at Boston, Massachusetts.

Affidavit in Support of Motion to Disqualify.

[Filed February 4, 1972.]

In accordance with 28 U.S.C. § 144, defendant avers that Judge Wood before whom the matter is pending has a personal bias or prejudice against the defendant.

As facts and reasons in support of this belief that bias or prejudice exists defendant states the following:

At the time of sentencing Judge Wood stated to the defendant "I don't believe you now and I didn't believe you then."

EDWARD G. BOOZ.

Dated this 7th day of January, 1972, at Philadelphia, Pennsylvania.

Then personally appeared before me, Edward G. Booz and made oath that he had read the foregoing Affidavit In Support Of Motion To Disqualify, and know the contents thereof; and that the facts stated therein are true of his own knowledge; except as are stated to be based on information and belief, and as to those that he believe them to be true, before me,

[no signature]
Notary Public.

My commission expires:

Appendix D.

Motion for a New Trial.

[Filed March 22, 1972.]

Now comes the defendant in the above-captioned matter and pursuant to Rule 33 of the Federal Rules of Criminal Procedure, moves the court to grant him a new trial for the following reasons:

1. The court erred in denying defendant's motions for acquittal made at the close of the evidence offered by the Government and renewed after the return of the jury verdict, said motions made by defendant pursuant to Rule 29 of the Federal Rules of Criminal Procedure.
2. The verdict is contrary to the weight of the evidence.
3. The verdict is not supported by substantial legal evidence.
4. The verdict is based upon hearsay and inferences predicated upon inferences and not proven facts.
5. The court erred in overruling defendant's objections to questions propounded by the Government to:
   a. Ernest Moyer
   b. Donald Worthington
   c. Lorraine Tanghe
   d. Katherin Kaprolet
   e. Noah Bass
   f. Carol Gelletich
   g. Sarah Kane
6. The court erred in denying defendant's motion for a voir dire hearing regarding Witness Kaprolet's competency as a witness.
7. The court erred in sustaining objections by the Government to defendant's questions addressed to:

a. Ernest Moyer
b. Donald Worthington
c. Lorraine Tanghe
d. Carol Gelletich
e. T. Covington

8. The court erred in admitting a grey felt hat into evidence.

9. The court erred in refusing to suspend the trial one-half a day until a bench warrant could be served upon a defense witness who had been properly summonsed.

10. The defendant was substantially prejudiced and denied of a fair trial by reason of the following circumstances:

a. Throughout the course of the entire trial, counsel for the defendant was accused by the Court, in the presence of the jury, that his objections to certain questions were groundless, frivolous, without basis, and were intended only to delay the trial and obstruct justice.

b. During cross-examination of government witnesses, counsel for the defendant was accused by the Court, in the presence of the jury, of attempting to confuse witnesses, obstruct justice and delay the trial.

c. During the trial, the Court, in the presence of the jury, specifically and emphatically concurred with a statement of the prosecutor, which included the following accusations: defense counsel was acting in bad faith; he was attempting to delay the trial and obstruct justice, and he had no right to object to the Government's questions.

11. Due to the Court's restrictions upon defence counsel's right to cross-examine witnesses, and due to the accusations of the Court and the prosecutor, defendant was denied the right of effective assistance of counsel.

12. Due to the accusations of the Court and the prosecutor, the jury could not fairly deliberate upon the evidence

in that they had repeatedly heard that defense counsel wished only to delay the trial, obstruct justice, and confuse Government witnesses.

13. The Court erred in denying the defendant's motion for a mistrial.

14. The interests of justice require a new trial.

Respectfully submitted,

By KEVIN M. KEATING,

By CHARLOTTE ANNE PERRETTA.

Appendix E.

Motion for Judgment of Acquittal Notwithstanding the Verdict and, in the Alternative, for a New Trial.

[Filed March 22, 1972.]

Now comes the defendant in the above-captioned matter, pursuant to Rule 29 (c) of the Federal Rules of Criminal Procedure, and respectfully moves this Honorable Court to set aside the verdict of guilty returned on March 17, 1972, and to enter judgment in accordance with this motion for judgment of acquittal.

In the alternative, defendant respectfully moves the court to set aside the verdict and grant him a new trial for those reasons set forth in his separately filed Motion for a New Trial.

Respectfully submitted,

By KEVIN M. KEATING,

By CHARLOTTE ANNE PERRETTA.

Appendix F.

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[4] His attitude since has been anything but favorable to him. He has been belligerent, to put it mildly, with the Probation Department. He has threatened that if he did get probation he wouldn't cooperate with them.

The Defendant: That is not true, sir.

The Court: Well, you say it isn't. I believe them. I don't believe you. I didn't believe you at the trial and I don't believe you now.

. . . . . .

[42] But you'll hear evidence that Mr. Booz was involved in the operation of a carnival at the Devon Horse Show and that the Devon Horse Show use a bank called the Bryn Mawr Trust Company, I believe it is and that Mr. Booz, on or about I believe it was July 11th, 10th or 12th, sometime in that area received his proceeds, his end of the proceeds of the Devon Horse Show.

. . . . . .

[93] Q. And you told us on direct examination that he came into the bank approximately once a month; is that correct?

A. That is approximately right.

Q. And is that since 1965?

A. Since I don't know. We had one there which was required to come in once a month. I think it was from 1956, I don't recollect the date.

Q. He was required to come in once a month?

A. Yes.

[94] Mr. Penrose: Mr. Moyer, I'm sorry, I'm having difficulty hearing you and the jury is too.

Q. Is it your testimony that in 1966 and 1967, he was required to go into your bank once a month?

A. He should have come in once a month, put it that way.

Q. Is it fair to say that besides the incident that you referred to that he was there on other occasions besides that once a month?

A. Very few, prior until just recently, prior to the robbery.

. . . . . .

[35] A. Before nine o'clock. I went to the vault, did my combination, opened the door and looked over my shoulder and Mr. Booz was standing at the back door.

Q. Again, referring to this diagram, where were you and where was Mr. Booz?

A. I was standing here (indicating) and I just—when I swung the vault door open, after I did my combination, Mr. Booz was standing right in this area here.

Q. Is that glass through there?

A. Yes, this is all glass, floor to ceiling.

Q. You could see Mr. Booz?

A. Yes.

Q. Could he see you?

A. Yes.

. . . . . .

[65] He's the only person that you have heard about who was looking through the window. I don't know why; maybe he wanted to write a check, cash a check, making a deposit, but put it together. Who was the only individual that you heard about—and they were subject to cross examination—did anybody else ever see you through the back window opening the vault, Mr. Worthington, dialing that last half of the combination, and seemingly within your own power, and your own power alone opening that vault door?

Who was that only person—and this wasn't even in the line of cross examination—the only person that you heard about was the defendant.

. . . . . .

[79] Q. All right, Mr. Moyer, it wasn't unusual for customers [80] regular customers of the bank to be in the parking lot waiting to come in the bank at nine o'clock when it opened before nine o'clock, was it?

A. It happens once in awhile.

Q. In fact, on the day of the robbery, on the 18th, it was a customer who was a relative, one of the relatives waiting to see the bank open up; is that correct?

A. That's the one, that one that was parking there when we came upstairs, yes.

. . . . . .

[51] A. Yes, the first one also had a ski mask and dark glasses and gloves, and this one had a hand gun.

. . . . . .

[25] At that time, when I first opened the first drawer and it only contained change, he accused me of stalling, used a long list of swear words and what have you. His voice—there was something about his voice at that time that changed substantially from the initial short phrases.

[26] Mr. Keating: Objection, your Honor, move to strike it.

A. —and it changed at the time—

The Court: No, the objection is overruled.

. . . . . .

[61] Let's look at another factor. Why would you disguise your voice? You've heard my voice ad nauseam for the last four days. You've heard Mr. Keating's voice;

you've heard Judge Wood's voice; you heard other voices from the witnesses, people you never met before. Do you think a week from now or a month from now you'd recognize my voice? Do you think you would? Maybe you would, maybe one or two of you think you would. But the point is, you heard my voice before. You had heard my voice plenty. Whose voice had those six people in the bank heard before; heard plenty?

. . . . . .

[71] Q. So is it your testimony that you don't remember which robber went with you the first time to the vault door?

A. Yes.

Q. And could you distinguish between the voices of the two robbers?

A. I didn't hear the one speak.

Q. You didn't hear one speak?

A. Right.

. . . . . .

[101] A. Yes. He was wearing a ski mask and dark glasses and gloves and had a shotgun and wore a raincoat or a trenchcoat affair and this one had a hat on, old felt hat on.

Q. He had an old felt hat?

A. Yes.

Q. And you say an old felt hat; it was all wrinkled up and banged up?

A. It wasn't a good one.

Q. Was it all beat up; that's what I'm asking you.

A. An old hat, not the style worn today.

Q. It wasn't a new hat?

A. Right.

Q. And you say it was a gray hat.

A. To the best of my knowledge I think it was a gray hat.

. . . . . .

Q. Looking at that hat, is there anything about it that you can distinguish or contrast that hat by the hat worn by one of the robbers?

A. It's similar in color and I described it to the F.B.I. as a felt-type hat.

. . . . . .

[30] Q. Agent Bass, you told us on direct, I believe, that this had—this is, the hat that you found on 113—wasn't in this condition?

A. No, it wasn't.

Q. In fact, it looked like it was a new hat?

A. It was a new looking hat, yes.

Q. In fact, the price tag was in when you found it?

A. Yes, it was.

Q. And it's still in there?

A. Still in there.

. . . . . .

[99] Q. Whereabouts, sir, were you standing on the property that you were plowing; how far away from the roadway were you?

A. I was right on the road bank, sir.

Q. As he went by, you took his license number?

A. Yes, that's right.

Q. And you say that license number is—

A. S0633.

Q. Are you sure that that's the license number that you took down, Mr. Kulp?

A. As far as I can remember.

. . . . . .

[69] [T]hen you hear from Farmer Kulp, a man about whom we had so much fighting, and Farmer Kulp said he was harrowing his field, minding his own business, farming his field, and this was three or more days after the robbery—I think it was three days, he said April 21—but he's farming his field in a place where he had seen over on Route 113 a day or so before State Police parking their vehicle, going out and rummaging around in the bushes; didn't know what it was all about, but it was kind of curious, and lo and behold, there is a day or so later after the police had gone away, what then did he see? He saw a white truck and he gave a license number.

. . . . . .

[139] Your Honor: S3350F, which has the zero and the threes, just like Farmer Kulp said; S0866Z, and I'll withdraw my offer of that [140] particular one; S0336R, which has been offered and marked as Exhibit number 11; and S3302B.

. . . . . .

[76] It's there and it is in direct that Mr. Booz came into the bank. He made the fifty-five hundred dollar deposit. He made a phone call. The money was obtained, it was wrapped, given to Margaret Rankin still banded, and came back very promptly, still banded, still intact, and then the blond-haired girl, Mrs. Renzi, then Miss Gellitich, checked it out and there's the evidence that she checked it out; it's her handwriting, she said, and here's the money.

The numbers match and they also match that other list. So we have a situation where the chief suspect, the man the F.B.I. was watching, of all the bad luck, of all the nasty coincidences, he was the guy who put in about seventy-five percent of the bait money in a deposit which contained about seventy percent of what the bank lost; fifty-five hundred, eighteen bills out of twenty-five bills. The proportions are not good, but I was always lousy in math, so it doesn't bother me.

. . . . . .

[74] Your Honor, may I ask that the Court in someway inform this attorney that it is an improper way to try a case that every time a question is asked, the attorney objects. It must be clear to the attorney by this time that although he might think that every question I ask is objectionable the Court does not share his opinion. I submit with due respect to counsel, perhaps acting in good faith, I don't know, that I can't try a case when everytime I ask a question, an interruption of the flow of infor[75]mation to the jury is ultimately destroyed and we've been putting up with this for at least a day and a half, and I cannot go on presenting this case in the way it should be presented and do justice to the government's position in this case if this continual interruption is going to go on. I would ask that the attorney be instructed that once he gets an overruled objection to a line of questioning that he simply wait until there's a new line of questioning and then, if he's agreeable to it, then and only then object. I can't live with the way this attorney is conducting this trial.

Mr. Keating: May I be heard, Your Honor?

The Court: Go ahead.

Mr. Keating: I ask Your Honor that my brother's untold remarks be stricken from the record.

The Court: Your brother's remarks are well taken. Your brother's remarks are precisely what I said. I asked you why you wouldn't take a general exception to the whole line of questioning of this witness; you refused to do that. You want an objection after every question.

. . . . . .

[72] Mr. Keating: All right, may I approach the bench, Your Honor?

The Court: No. All you want to do is have this trial conducted at the bench of the Court. We're trying it before that jury.

Mr. Keating: Absolutely.

The Court: They're going to make the decision and I'm not going to keep interrupting it every fifteen or twenty minutes to have a side bar conference.

. . . . . .

[17] Your Honor, may I approach the bench?

The Court: No, I said repeatedly we are not going to try this case at side bar conference. The jury is going to hear the facts and make their decision and repeated side bar conferences for no purpose at all just delay the trial and we've delayed it enough already.

Now, read the question back.

Mr. Keating: May I take an exception to Your Honor's remarks?

The Court: Of course.

. . . . . .

[134] The Court: I don't want to hear an Offer of Proof. I've put up with this long enough. If you want to put some testimony in, you put it in, if and when your case

arises. You are not going beyond the scope of the cross examination; you're not going to present items that this man brought to you from his pocket, and the testimony from the last item is so irrelevant, it's unbelievable. You're doing the same thing again and you're not going on some kind of an expedition in this Court. Now, you just ask another question, if you will.

. . . . . .

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1429

EDWARD GEORGE BOOZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the judge's conduct of the trial was so prejudicial as to deny him a fair trial; that the judge was personally biased and should have disqualified himself; and that the evidence was insufficient to sustain his conviction.

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on three counts of armed robbery of a federally insured bank, in violation of 18 U.S.C. 2113(a), (b), and (d). On appeal, the conviction was reversed, 451 F. 2d 719 (C.A. 3), and the case remanded to the district court for retrial. On retrial petitioner was again convicted. He was sentenced to a term of imprisonment for ten years and a fine of $5,000. The court of appeals affirmed (Pet. App. A).

On April 18, 1967, the Bucks County Bank and Trust Company in Dublin, Pennsylvania, was robbed. Twenty-five bait bills in twenty dollar denominations were taken during the course of the robbery (Tr. sec. 4 at 26, 29).[1]

The robbery was committed by two men, both wearing ski masks, dark glasses and gloves; they were carrying guns (Tr. sec. 3 at 50-52; sec. 4 at 16-17). In addition, one robber wore an old felt hat and a raincoat (Pet. App. F at 32-33; Tr. sec. 4 at 16-17). The robbers had apparently forced entry into the building (Tr. sec 4 at 27-29) during the night. Upon arrival each employee was accosted, taken to the basement, tied and blindfolded (Tr. sec. 3 at 51-53; sec. 4 at 21).

Without asking if he knew the combination, the robbers selected assistant manager Donald P. Worthington, and took him upstairs to open the vault (Tr. sec. 4 at 22-23). The first part of the combination was known only to bank manager Ernest Moyer, who usually would arrive first at the bank and immediately dial his numbers (Tr. sec. 3 at 54-55). Worthington would customarily arrive fifteen or twenty minutes later and dial his numbers, and then physically open the vault (Tr. sec. 3 at 54-55). Since Moyer had not had a chance to dial his half of the combination, Worthington was unable to open the vault when taken upstairs by the robbers (Tr. sec. 4 at 23-24). Worthington was then brought back down to the basement, and Moyer was taken up and forced to dial the first numbers (Tr. sec. 3 at 53-54; sec. 4 at 23-24). Immediately

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[1] "Tr." designates the transcript, a copy of which is being filed with the Clerk of this Court. Each day of the trial is numbered separately, and each is designated as a separate section.

afterwards Worthington was again taken upstairs and forced to dial the final numbers and open the safe (Tr. sec. 4 at 24-25).

Petitioner had been doing business at this branch of the bank for several years (Tr. sec. 3 at 93). Over the years, his business had brought him to the bank approximately once a month, but in the two or three weeks preceeding the robbery, he was seen there approximately twice a week (Tr. sec. 4 at 90-91). He was seen making an examination of the area where the forced entry was later made (Tr. sec. 4 at 98-99). In addition, Worthington observed petitioner looking at him through the back windows of the bank prior to business hours while he dialed the second half of the combination and opened the safe (Tr. sec. 4 at 37).

The robbers fled the scene in a car belonging to one of the tellers. They left it on an abandoned, overgrown dirt road a few miles away (Tr. sec. 4 at 27; sec. 5 at 9-10). On the morning of the robbery a tan compact car, probably a Corvair, was observed parked along the road where the getaway car was abandoned (Tr. sec. 4 at 128-129). On the afternoon subsequent to the robbery, an F.B.I. search of the field adjacent to the parked car yielded a man's hat of the same description as the one worn by one of the robbers (Tr. sec. 4 at 74-75; sec. 5 at 13, 14). It was found approximately twenty-five feet from where the tan automobile had been parked (Tr. sec. 5 at 14-15).

Three days following the robbery, a local farmer observed a white pick-up truck parked at the approximate location where he had seen "police activity" the day or so before (Tr. sec. 5 at 71-74). The driver got out, looked around in the field, and got back in the truck

and drove off (Tr. sec. 5 at 84-85). The farmer attempted to record the license number of the white truck as it drove off, repeating the number to himself as he walked back the distance to his tractor and then writing it in the dust on the hood (Tr. sec. 5 at 85-87). The number he noted was SO633 (Tr. sec. 5 at 89). At the time of the robbery, petitioner owned a white Chevrolet pick-up truck with the license number S6003R (Tr. sec. 5 at 125, 128, 145).

On June 6, 1967, petitioner deposited $5,500 in his account at the Frankford Avenue Branch of the Gerard Trust Bank (Tr. sec. 5 at 110-113). Among the bills deposited were eighteen bills contained on the bait list (Tr. sec. 5 at 153-155). Petitioner claimed that he received the money from sources other than the robbed bank (Tr. sec. 5 at 21-22).

1. Petitioner contends that the trial judge's conduct of the trial was so prejudicial as to constitute reversible error. However, the judge's remarks cited by petitioner (Pet. App. F at 35-37) were provoked by defense counsel's tactic of constantly making unsustainable objections to virtually every question put by the government, and of requesting bench side conferences every few minutes. While, as the court below noted, the judge's comments may have fallen "short of desirable judicial fastidiousness," they did not express an opinion as to petitioner's guilt or innocence and were not of such a nature as to require a mistrial. In his final charge to the jury, moreover, the judge stated that it was up to the jury to determine the facts in the case (Tr. sec. 7 at 4).

2. Petitioner contends that the trial judge exhibited personal prejudice and should have disqualified himself. Petitioner's counsel filed a motion seeking to disqualify

the judge who heard petitioner's first trial from hearing the case on remand. The only stated basis for this motion was that the First and Second Circuits have a rule automatically reassigning a case on remand. At the January 7, 1972, hearing on this motion, petitioner's counsel first raised the issue of judicial bias as a ground for disqualification. Counsel's argument was based on the following exchange of remarks made at the time petitioner was sentenced after his first trial (Tr. sec. 1 at 4):

> THE COURT: * * * In my opinion he had a fair trial. There was ample evidence to convict him. The jury found him guilty. His attitude since has been anything but favorable to him. He has been belligerent, to put it mildly, with the Probation Department. He has threatened that if he did get probation he wouldn't cooperate with them.
>
> THE DEFENDANT: That is not true, sir.
>
> THE COURT: Well, you say it isn't. I believe them. I don't believe you. I didn't believe you at the trial and I don't believe you now.
>
> He has also said that if he is sentenced to jail he will abscond. Now, you needn't believe that and he needn't believe it, but I have been in this court a long while and I believe the probation officers.

It is well settled that under 28 U.S.C. 144 the same judge who heard the original trial can also hear the case on remand. *Dukes* v. *United States,* 407 F. 2d 863 (C.A. 9), certiorari denied, 396 U.S. 897. This Court has, moreover, held that "bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States* v. *Grinnell Corp.,* 384 U.S. 563,

583. Since there is no allegation here that the judge formed his opinion of petitioner's credibility by using extrajudicial sources, the denial of petitioner's motion to disqualify the trial judge was correct.

3. Petitioner contends that the evidence was circumstantial and equally consistent with innocence as with guilt, and therefore insufficient for conviction. This contention is answered by the facts. Petitioner's further argument that where the evidence is circumstantial, it must be such as to exclude every reasonable hypothesis other than guilt for a conviction to be valid is without merit. *Holland* v. *United States,* 348 U.S. 121, 139-140.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1973.

DOJ-1973-07